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IN THE
COURT OF APPEALS OF INDIANA

TYRONE DENNY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0609-CR-507
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0502-FA-24634

JULY 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Tyrone Denny appeals his convictions of attempted robbery, three counts of criminal confinement, battery, intimidation, and pointing a firearm. He also appeals his sentence.

We affirm.

ISSUES

Denny presents two issues for our review, which we restate as:

I. Whether his convictions violate his right to be free from double jeopardy under the United States Constitution and the Indiana Constitution.

II. Whether Denny's sentence is appropriate.

FACTS AND PROCEDURAL HISTORY

In February 2005, Denny and Jason Jenkins went to the home of Quontico and Amber Brisker. The men hit Quontico in the head with a handgun and forced their way into the Brisker home. They then held the Briskers and their young son at gunpoint. Denny then took Quontico to the garage and Jenkins remained in the home with Amber and her son. When the police arrived, Quontico was able to exit the garage and Amber exited the house with her son while the police chased, and eventually apprehended, Denny and Jenkins.

Based upon this incident, Denny was charged with numerous offenses. Following a jury trial, he was convicted of attempted robbery, a Class B felony, Ind. Code §§ 35-42-5-1 and 35-41-5-1; three counts of criminal confinement, Class B felonies, Ind. Code § 35-42-3-3; battery, a Class C felony, Ind. Code § 35-42-2-1; intimidation, a Class C

felony, Ind. Code § 35-45-2-1; pointing a firearm, a Class D felony, Ind. Code § 35-47-4-3; carrying a handgun without a license, a Class A misdemeanor, Ind. Code § 35-47-2-1; and resisting law enforcement, a Class A misdemeanor, Ind. Code § 35-44-3-3. The trial court sentenced Denny to an aggregate sentence of thirty years. It is from these convictions and this sentence that Denny now appeals.

DISCUSSION AND DECISION

I. DOUBLE JEOPARDY

A.) Federal Constitution

As his first issue, Denny contends that his convictions violate the United States Constitution's prohibition against double jeopardy contained in the Fifth Amendment. However, Denny fails to provide any independent analysis for this argument under the federal constitution. Due to such failure, this argument is waived on appeal. *See Minton v. State*, 802 N.E.2d 929, 938 n.8 (Ind. Ct. App. 2004), *trans. denied*; Ind. Appellate Rule 46(A)(8).

B. State Constitution

Denny also asserts that several of his convictions violate our state constitution's prohibition against double jeopardy. Particularly, Denny claims that the same evidence used to convict him of attempted robbery was used to convict him of criminal confinement, battery, intimidation, and pointing a firearm.

Ind. Const. Art. 1 § 14 provides "No person shall be put in jeopardy twice for the same offense." Two or more offenses are the "same offense" in violation of the Indiana Constitution, where, with respect to either the statutory elements of the challenged crimes

or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Richardson v. State*, 717 N.E.2d 32, 49-50 (Ind.1999). Denny challenges his convictions solely under the actual evidence test.

With respect to the actual evidence test, we must examine the evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). Application of the actual evidence test requires the reviewing court to identify the essential elements of each challenged crime and to evaluate the evidence from the jury's perspective, considering, where relevant, the jury instructions and argument of counsel, as well as other factors that may have guided the jury's determination. *Caron v. State*, 824 N.E.2d 745, 753 (Ind. Ct. App. 2005), *trans. denied*, 831 N.E.2d 747. To demonstrate that two offenses are the same under this test, the appellant must show a reasonable probability that the facts used by the trier of fact to establish the essential elements of one offense were also used to establish the essential elements of the second offense. *Robinson*, 835 N.E.2d at 523. Further, the appellant's showing must amount to more than a remote or speculative possibility that the same facts were used. *Id.* Our state's double jeopardy clause is not violated when the evidentiary facts that establish the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense. *Caron*, 824 N.E.2d at 753.

Denny suggests that all of his challenged convictions are based upon his conviction of attempted robbery. In his brief, Denny has failed to make the required

showing of a reasonable probability that the jury used the same evidentiary facts to convict him of attempted robbery as they did to convict him of criminal confinement, battery, intimidation and pointing a firearm. Nevertheless, we will review his allegation concerning all of these convictions in this appeal. The jury found Denny guilty of attempted robbery as a Class B felony, a lesser-included charge of the offense of attempted robbery as a Class A felony with which he was originally charged. The court's final instruction informed the jury that to convict Denny of attempted robbery as a Class B felony, the State must have proved the following:

1. [Denny]
2. knowingly or intentionally
3. attempted to take property from Quontico Brisker
4. by using or threatening the use of force on Quontico Brisker or by putting him in fear
5. by the use of a handgun
6. and took a substantial step towards committing the crime of robbery by demanding money from Quontico Brisker.

Appellant's Appendix at 138.

The first charge that Denny claims is based upon the attempted robbery charge consists of a group of charges. He was convicted of three counts of criminal confinement based on three different victims. The charging information for these three convictions, which was read as part of the court's instructions to the jury, is as follows:

> Tyrone Denny [ ], on or about February 14, 2005, did knowingly, while armed with a deadly weapon, that is: handgun[ ], confine Quontico Brisker, without the consent of Quontico Brisker, by holding Quontico Brisker inside a house and moving him about inside said house[.]
>
> Tyrone Denny [ ], on or about February 14, 2005, did knowingly, while armed with a deadly weapon, that is: handgun[ ], confine Amber

> Brisker, without the consent of Amber Brisker, by holding Amber Brisker inside a house[.]
>
> Tyrone Denny [ ], on or about February 14, 2005, did knowingly, while armed with a deadly weapon, that is: handgun[ ], confine Quontico Brisker Jr., a person who was then under the age of fourteen (14) years, that is: three, and not the child of Tyrone Denny [ ], without the consent of Quontico Brisker Jr., by holding Quontico Brisker Jr. inside a house[.]

Appellant's App. at 38-39.

The evidence presented by the State in order to prove the attempted robbery charge consists of the testimony of the victims, the Briskers. Quontico testified that Denny and Jenkins forced him to unlock the door and entered his house with him. They continued to ask Quontico about money while brandishing their revolver and automatic handguns and searching his pockets for money.

The evidence establishing the confinement charges also consists of the Briskers' testimony. The confinement of Quontico was proven by the following evidence: Quontico stated that both Denny and Jenkins had handguns. They forced Quontico into the house at gunpoint, took him through the house at gunpoint until they went into the back bedroom with him where they ordered him to take off all of his clothes. Denny then took Quontico, while he was naked, into the garage where he remained until police arrived.

Regarding Denny's confinement of Amber, the evidence showed that Denny entered the Brisker home brandishing his handgun, and that Denny and Jenkins forced Amber, at gunpoint, into the back bedroom where she remained with Jenkins, who was armed.

Finally, the last count was for the confinement of Quontico and Amber's son, Quontico Jr. Quontico Jr. was brought into the back bedroom with his parents and was held there at gunpoint with his mother.

Generally, when the facts indicate that the confinement was more extensive than that necessary to commit the robbery, there is no double jeopardy violation for convictions of both criminal confinement and robbery. *Benavides v. State*, 808 N.E.2d 708, 712 (Ind. Ct. App. 2004), *trans. denied*. Here, Denny confined Quontico, Amber and Quontico Jr. in the back bedroom while demanding money. Quontico was then forced to strip and leave the room naked while Denny's accomplice continued to confine Amber and Quontico Jr. in the back bedroom. We believe in this instance the confinement was more extensive than that necessary to commit the attempted robbery. *See id*. (holding that convictions for robbery and criminal confinement did not violate prohibition against double jeopardy where defendant's confinement of victim at gunpoint in her bedroom before leading her at gunpoint into living room where he took money, marijuana, and prescription pills was more extensive than that required to complete robbery); *see also Hopkins v. State*, 759 N.E.2d 633, 640 (Ind. 2001) (explaining that defendant's confinement of victims extended well beyond what was necessary to rob them because defendant forced victims into basement at gunpoint, robbed them and then went upstairs to search house). Therefore, there is no reasonable possibility that the same evidentiary facts used to convict Denny of the offense of attempted robbery were also used to convict him of the three counts of criminal confinement.

Denny next alleges that the jury used the same evidentiary facts to convict him of both attempted robbery and battery. We have previously set out above the jury instruction used by the court for the offense of attempted robbery. The State charged Denny with battery as follows:

> Tyrone Denny [ ], on or about February 14, 2005, by means of a deadly weapon, that is: handgun[ ], did knowingly touch Quontico Brisker in a rude, insolent, or angry manner, that is: hit at and against Quontico Brisker with said handgun, which resulted in serious bodily injury, that is: unconsciousness and/or extreme pain, to Quontico Brisker.

Appellant's App. at 39. The charging information was also included in the court's instructions to the jury at trial. *See* Appellant's App. at 88.

Although the evidentiary facts used to establish the offense of attempted robbery are closely related in time with the evidentiary facts used to establish the offense of battery, we do not believe there is a reasonable possibility that the jury used the same facts to convict Denny of both offenses in violation of our state double jeopardy clause. As we discussed above, the evidentiary facts establishing the offense of attempted robbery were supplied through the testimony of Quontico. Likewise, he testified that Denny and Jenkins came upon him as he was exiting his car in his driveway. They caught him before he entered his home and hit him with a handgun, knocking him unconscious. Denny and Jenkins then kicked him back to consciousness.

The materials on appeal reveal that the State originally charged Denny with attempted robbery as a Class A felony. This offense requires not only a knowing or intentional taking of property from another person by the use or threat of use of force, or by putting the person in fear, and the taking of a substantial step towards committing the

crime of robbery, but also adds the additional requirement of serious bodily injury to someone other than the defendant. *See* Ind. Code § 35-42-5-1. However, in its final instructions to the jury, the court included an instruction on the lesser-included offense of attempted robbery as a Class B felony. This offense requires the knowing or intentional taking of property from another person by the use or threat of use of force, or by putting the person in fear, and the taking of a substantial step towards committing the crime of robbery, while armed with a deadly weapon. *See* Ind. Code § 35-42-5-1.[1] The jury found Denny not guilty of the Class A felony offense of attempted robbery but instead found him guilty of that offense as a Class B felony. This is the most telling information as to what evidence the jury used to convict Denny on each of the two charges of attempted robbery and battery. Because the attempted robbery offense contained a requirement for the use of a deadly weapon (i.e., handgun) and no requirement of injury, the jury could not have convicted him on both offenses using the same evidentiary facts. Thus, we conclude there is no reasonable possibility that the jury used the same evidentiary facts to establish the essential elements of the offense of attempted robbery as it used to establish the essential elements of the offense of battery.

Denny also contends that his conviction of intimidation, in addition to his conviction of attempted robbery, violates the state's prohibition against double jeopardy.

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[1] The Class B felony offense of robbery can be established by *either* the additional element of being armed with a deadly weapon, *or* by the additional element of bodily injury to someone other than the defendant. *See* Ind. Code § 35-42-5-1. In the present case, the State chose to charge Denny with the Class B felony offense of attempted robbery solely based upon his possession of a handgun.

The charging information for the offense of intimidation was read to the jury as part of the court's instructions at trial and states as follows:

> Tyrone Denny [ ], on or about February 14, 200[5], did communicate to Amber Brisker, another person, a threat to commit a forcible felony, that is: to kill her son if she did not tell her husband to come out of the garage, with the intent that Amber Brisker engage in conduct against her will, and while doing so, Tyrone Denny [ ] did draw or use a deadly weapon, that is: handgun[ ][.]

Appellant's App. at 39.

The evidentiary facts establishing the offense of intimidation consist of Amber's testimony describing Denny's actions in using his gun while threatening to kill Quontico Jr. if Amber did not tell Quontico to open the garage door. Therefore, the charging information, the court's instructions, and the evidence all suggest the jury would not have relied on the same facts to convict Denny of both attempted robbery and intimidation.

The final conviction that Denny asserts causes a violation of his right against double jeopardy in conjunction with his conviction for attempted robbery is his conviction for pointing a firearm. The charge, which was included in the jury instructions, states:

> Tyrone Denny [ ], on or about February 14, 2005, did knowingly point a firearm, that is: a handgun at another person, namely: Quontico Brisker Jr.

Appellant's App. at 89. To establish the elements of this charge, Amber, Quontico Jr.'s mother, testified that Denny re-entered the house after being outside with Quontico, grabbed Quontico Jr. and put a gun to his head. There is no reasonable possibility that

the jury utilized the same evidentiary facts to establish this offense as it did to establish the offense of attempted robbery.

C. Single Larceny Rule

As an additional argument, Denny suggests that his right to be free from double jeopardy was violated by his convictions of and sentences for attempted robbery in addition to three counts of criminal confinement, battery, intimidation, and pointing a firearm. Denny insists that he committed only one offense, attempted robbery, and that the trial court erred in convicting him of and sentencing him for seven separate offenses in violation of the single larceny rule.

"The single larceny rule provides that when several articles of property are taken at the same time, from the same place, belonging to the same person or to several persons, there is but a single larceny, i.e. a single offense." *Beaty v. State*, 856 N.E.2d 1264, 1270 (Ind. Ct. App. 2006), *trans. denied*. This rule, by its own terms, refers to the taking of property (i.e., theft). *See id*. at 1271. In the instant case, Denny's offenses were not property offenses but rather were offenses against a person. Our research discloses no case in which the appellate courts of this state have applied the single larceny rule to a case other than a property case, and Denny cites to none. We decline Denny's invitation to extend the single larceny rule to personal offenses.

D. Same Acts

Intertwined with his allegation that his convictions violate the actual evidence test, is Denny's argument that his convictions of criminal confinement, battery, intimidation and pointing a firearm arise from the same act (i.e., his act of attempted robbery).

Therefore, he posits, these convictions violate the prohibition against double jeopardy and cannot stand.

In addition to the actual evidence and the statutory elements tests as set forth in *Richardson*, *supra*, there are several situations involving rules of statutory construction and common law that have been acknowledged to violate double jeopardy. *See Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002). The one that we are concerned with here is conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished. *See id*.

We alluded to this issue in section B., above, when we discussed the evidentiary facts of Denny's convictions of attempted robbery and confinement. We reiterate here that Denny's act of attempted robbery and his acts of the three counts of confinement do not violate double jeopardy principles because the confinement offenses in this case were more extensive than that necessary to commit the attempted robbery. *See Benavides*, 808 N.E.2d at 712.

The battery, too, is a separate act from the attempted robbery. The battery was the first act to occur in this whole incident. Denny and Jenkins caught Quontico as he was getting out of his car in his driveway. They hit him in the head with their handguns and knocked him unconscious. When he fell to the ground, they began kicking him, and he regained consciousness. At this point, the battery was complete. The attempted robbery then occurred as Denny and Jenkins forced Quontico to his house and forced him to open the door and admit them into his house. Moreover, as we noted above in our discussion in section B., the jury found Denny guilty of the lesser-included offense of attempted

robbery as a Class B felony based upon Denny's use of a handgun and not based upon any resulting injury. Thus, the jury's decision, as well as the evidence, shows that these two offenses were separate acts that did not violate Denny's right against double jeopardy.

Denny's act of intimidating Amber and his act of pointing a firearm at Quontico Jr. were also separate acts from his act of attempted robbery. The attempted robbery was complete when the intimidation and pointing a firearm offenses occurred. Denny had made his demand for money and had taken Quontico out to the garage, and Jenkins had left. Amber was going to check on Quontico when Denny re-entered the house and committed the offenses of intimidation and pointing a firearm.

E. Multiple Confinement Convictions

Denny argues that the three counts of criminal confinement should merge under double jeopardy principles because "they were closely related in time and arose from simultaneous acts." Appellant's Brief at 10. Denny fails to cite to any case law for this theory.

Multiple confinement convictions do not violate double jeopardy where there are multiple victims. *Burnett v. State*, 736 N.E.2d 259, 263 n.3 (Ind. 2000), *overruled on other grounds by*, *Ludy v. State*, 784 N.E.2d 459 (Ind. 2003). The victims here numbered three: Quontico, Amber and Quontico Jr. We find no double jeopardy violation.

II. SENTENCING

For his second issue, Denny avers that his sentence is inappropriate. Particularly, he claims error with the trial court's order that he serve his sentences for Counts I, III, and IV consecutively.

Sentencing is a determination within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of discretion. *Allen v. State*, 722 N.E.2d 1246, 1250 (Ind. Ct. App. 2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances of the case. *Groves v. State*, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005).

Under Article VII, Section 6 of the Indiana Constitution, we have the constitutional authority to review and revise sentences. However, we will not revise the sentence imposed unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Our review under Appellate Rule 7(B) is extremely deferential to the trial court. *Martin v. State*, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003).

In the present case, Denny was convicted of four B felonies, two C felonies, one D felony, and two A misdemeanors. He was sentenced to the presumptive terms on all of the felony convictions and to one year on each of the two A misdemeanor convictions.[2]

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[2] On April 25, 2005, between the date of Denny's offense on February 14, 2005 and the date of his sentencing on August 18, 2006, statutory amendments took effect whereby the legislature amended the state sentencing scheme to provide for "advisory" sentences rather than "presumptive" sentences. These amendments constitute a substantive change in a penal statute and, therefore, may not be applied retroactively. *See Combs v. State*, 851 N.E.2d 1053, 1066 n.8 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 595. Thus, in the present case, we are required to apply the prior "presumptive" sentencing scheme.

At the time Denny was sentenced, the presumptive term for a Class B felony was ten years, *see* Ind. Code § 35-50-2-5; a Class C felony carried a presumptive term of four years, *see* Ind. Code § 35-50-2-6; and a Class D felony carried a presumptive term of one and one-half years, *see* Ind. Code § 35-50-2-7. Finally, a Class A misdemeanor carried with it a term of imprisonment of up to one year. *See* Ind. Code § 35-50-3-2. The court imposed a thirty-year sentence in this case because it ordered Counts I, III, and IV (all Class B felonies), to be served consecutively.

In sentencing Denny, the court found Denny's criminal history as an aggravating factor, and, as only a mildly mitigating factor, the court found the hardship on Denny's dependent child that would be caused by his long-term imprisonment. The court stated that the aggravating and mitigating factors balance. Tr. at 249. Generally, where the sentencing court finds that aggravating and mitigating circumstances are in equipoise, we have required concurrent sentences. *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied by Smylie v. Indiana*, 126 S.Ct. 545, 163 L.Ed.2d 459 (2005) (*citing Marcum v. State*, 725 N.E.2d 852, 863-64 (Ind. 2000)). However, the existence of multiple victims justifies the imposition of consecutive sentences. *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003). Here, it is undisputed that there were multiple victims of these crimes --- Quontico, Amber, and their son. Thus, consecutive sentences were proper.

Additionally, we find that the sentence imposed is not inappropriate in this instance. Denny and his partner accosted Quontico on his driveway and then forced him, bleeding and barely conscious, into his own home at gunpoint. Once inside the home, Denny held his gun to the head of Quontico and Amber's very young son. Denny

committed these crimes with alarming disregard for the sanctity of another person's home and family, as well as with total disregard for the life of a very young child. Moreover, as the court noted, Denny has a criminal record. Even given these circumstances, the court sentenced Denny to presumptive terms on all of his felony offenses. The trial court then imposed consecutive sentences for an aggregate sentence of thirty (30) years. Consecutive sentences were warranted in this case based upon the aggravating factor of multiple victims. *See Serino*, *supra*.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that Denny's right to be free from double jeopardy was not violated. The imposition of consecutive sentences is proper, and Denny's sentence is not inappropriate.

Affirmed.

KIRSCH, J., and NAJAM, J., concur.